UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

ATEN INTERNATIONAL CO., LTD., and ATEN TECHNOLOGY INC.	)	
Plaintiffs,	)	**Case No. 2:08-cv-253-DF-CE**
v.	)	**JURY TRIAL DEMANDED**
EMINE TECHNOLOGY CO., LTD., BELKIN INTERNATIONAL INC., and BELKIN INC.	)	
Defendants.	)	

PLAINTIFF ATEN INTERNATIONAL CO., LTD.'S SUR-REPLY IN SUPPORT OF ITS OPPOSITION TO DEFENDANT EMINE TECHNOLOGY CO., LTD.'S MOTION TO TRANSFER VENUE

Emine's reply brief (Dkt. No. 36) provides no justification for transferring this action under 28 U.S.C. § 1404(a). Emine also misapplies the first-to-file rule because the instant action pending in this district is the first-filed case under the first-to-file analysis, as explained below.

First, the first-to-file rule only applies to cases that are co-pending in different districts. *Save Power Ltd. v. Syntek Finance Corp.*, 121 F.3d 947, 950 (5th Cir. 1997). The California action (Case No. 3:07-cv-00012) was not pending at the time this action was filed because it had already been voluntarily dismissed without prejudice under Fed. R. Civ. P. 41(a)(1). The law is clear that a "voluntary dismissal without prejudice 'leaves the situation the same as if the suit had never been brought in the first place.'" *Elbaor v. Tripath Imaging, Inc.*, 279 F.3d 314, 319 n. 5 (5th Cir. 2002) (quoting *Humphreys v. United States*, 272 F.2d 411, 412 (9th Cir. 1959)).[1] The dismissed California action therefore has no relevance to the first-to-file or § 1404(a) analysis.

Second, the action against Belkin pending in this district, which was filed in 2006, is the "true" first-filed action among all of the actions involving the '112 patent. Emine erroneously suggests that the Belkin action is not "first-filed" as to Emine because Emine is not a party to that action (*see* Emine's reply brief at 1, n.3), but the first-to-file rule does not require that the two cases be identical or involve identical parties. *See Save Power*, 121 F.3d at 950-91. All that is required is a "substantial overlap" between the two actions. *See id.* Such a "substantial overlap" clearly exists in the present situation, as the case against Belkin and the case against Emine both involve the '112 patent and the Emine-manufactured accused products distributed by Belkin throughout the United States, Texas and this district.

[1] Emine repeatedly suggests that ATEN should have sought the California court's permission to dismiss the California action, but there is no basis for any such suggestion. Under Rule 41(a) of the Federal Rules of Civil Procedure, a plaintiff has the right to voluntarily dismiss an action without prejudice and without having to seek permission before the opposing party files an answer or a motion for summary judgment. Fed. R. Civ. P., Rule 41(a)(1)(A)(i). Because Emine had not filed an answer or a motion for summary judgment, ATEN properly dismissed the California action under Fed. R. Civ. P. 41.

The case cited by Emine in its reply brief, *O2 Micro Int'l, Ltd. v. Monolithic Power Sys.*, 2006 U.S. Dist. LEXIS 21870 (E.D. Tex. Mar. 28, 2006), not only utterly fails to support Emine's position, but actually supports the denial of its motion to transfer. In that case, O2 belatedly filed an action against Monolithic in the Eastern District of Texas on a continuation patent, but by that time, litigations on its related parent patents had already been pending between O2 and Monolithic in the Northern District of California. *See O2*, 2006 U.S. Dist. LEXIS 21870 at *5-6. The Texas district court, not surprisingly, granted a motion to transfer the second-filed suit to the Northern District of California where the first-filed suits had been pending. Like *O2*'s belated case in Texas, Emine's second-filed declaratory judgment action in California (Case No. 3:08-cv-3122) should be transferred here because as of its filing, two first-filed actions on the same '112 patent were already pending in this district. Thus, the *O2* case supports denial of Emine's motion.

The other case cited by Emine, *BridgeLux, Inc. v. Cree, Inc.*, 2007 U.S. Dist. LEXIS 95476 (E.D. Tex. Feb. 5, 2007), also supports denial of Emine's motion to transfer. The district court in *BridgeLux* bifurcated an infringement action by retaining jurisdiction over certain "first-filed" patents that had not been involved in any other pending litigation, while declining jurisdiction over "second-filed" patents that had been involved in another pending first-filed litigation. Here, the instant case is "first-filed" because at its filing no other pending cases existed between ATEN and Emine on the '112 patent. Hence, the *BridgeLux* actually counsels for retention of jurisdiction over the instant case and supports denial of Emine's motion.

Emine's attempts to distinguish *Cummins-Allison Corp. v. Glory Ltd.* and other cases cited in ATEN's opposition brief are without merit. Emine's arguments on whether the plaintiffs in those cases had the opportunity to litigate the patents-at-issue in a forum outside of Texas are wholly irrelevant under the first-to-file or § 1404(a) analysis. Here, the first-filed cases involving the ’112 patent, including the Belkin action and the instant case, had already been pending in this district when Emine’s declaratory judgment action in California was filed, and as such, they should remain in this district.

Finally, Emine has offered no evidence to meet its heavy burden of justifying a transfer under § 1404(a). For the reasons expressed above and in ATEN’s opposition brief, Emine’s motion to transfer should be denied.

Dated: October 7, 2008

Respectfully submitted,

/s/ Eric H. Findlay___

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ATTORNEYS FOR ATEN INT’L CO., LTD.
AND ATEN TECHNOLOGY INC.

CERTIFICATE OF SERVICE

I hereby certify that on this the 7th day of October, 2008, a true and correct copy of the foregoing instrument was served upon all parties via electronic mail.

/s/ Eric H. Findlay______________
Eric H. Findlay